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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Local Exchange Carriers' Rates)
Terms, and Conditions for)
Expanded Interconnection for)
Special Access)

CC Docket No. 93-162

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REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee" or "Committee"), pursuant to the Commission's Public Notice, DA 94-821, released July 26, 1994, hereby replies to the comments filed in response to the Petition For Clarification submitted herein on June 30, 1994, on behalf of Bell Atlantic.

Bell Atlantic requests clarification of language regarding individual case basis ("ICB") service offerings found at paragraph 17 and footnote 35 of the Common Carrier Bureau's Supplemental Designation Order and Order to Show Cause, DA 94-556 (Com. Car. Bur., rel. May 31, 1994) (the "Order"). Bell Atlantic contends this language is inconsistent with existing Commission policy concerning ICB service offerings and with the United States Court of Appeals for the District of Columbia's recent holding concerning the Commission's treatment of "dark fiber" service offerings.^{1/} Bell Atlantic and LECs supporting its

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^{1/} Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) ("Dark Fiber Decision").

request for clarification^{2/} take out of context and misinterpret the Bureau's statements, and misread the Court's Dark Fiber Decision. The Ad Hoc Committee generally supports the comments of those opposing the Petition, and believes clarification is unnecessary and that the Bell Atlantic Petition should be denied.

I. Bell Atlantic Fundamentally Misinterprets The Bureau's Order

Bell Atlantic contends that "language in [the] Order erroneously states that ICB arrangements are common carrier offerings" and that "ICB rates are 'generally available' if tariffs with those rates are filed." Petition, pp. 1-2. The Ad Hoc Committee agrees with those commenters that point out that Bell Atlantic misconstrues and reaches for an overbroad interpretation of the Order.^{3/} The fundamental flaw in Bell Atlantic's argument is that it fails to recognize that the Bureau's discussion of ICB service offerings is presented wholly within the context of addressing special access expanded interconnection, a common carrier service offering. The Order does not purport to address those types of ICB services that are not generally held out to the public on a nondiscriminatory basis and, therefore, would not constitute common carrier service offerings. Thus, the first of the two objected-to passages refers specifically to "[p]ricing access services on an

^{2/} Comments in support of the Petition were filed on behalf of Southwestern Bell Telephone Company ("SWB") and US WEST. Comments in opposition were filed by MCI, Sprint, MFS Communications Company, Inc. ("MFS"), and The Association of Local Telecommunications Services ("ALTS").

^{3/} MCI Comments, pp. 5-7; ALTS Comments, pp. 2-3.

individual case basis [as] represent[ing] a departure from normal practice and [as being] usually reserved for unique or unusual common carrier service offerings for which the carrier does not yet have sufficient experience to develop general rates."

(Order, ¶ 17). Given that expanded interconnection is without question a common carrier service offering, the Bureau's statement is entirely unremarkable, accurately portrays Commission policy, and is good law. The Order states that common carrier service offerings may be priced on an ICB basis in appropriate (albeit unusual) circumstances, not that all ICB arrangements are common carrier offerings as asserted by Bell Atlantic.

Similarly, Bell Atlantic fails to recognize that the second of the objected-to statements was made in the context of the discussion's overall common carrier premise and, moreover, includes explicit reference to a broad offering of service:

The filing of an individual case basis rate does not affect the general availability of a service offering. Individual case basis rates are "generally available" if tariffs embodying these rates are filed and are available to all similarly situated customers. (Order, fn. 35). (Emphasis added).

The quoted language does indicate, however, -- and correctly so -- that a service provider cannot convert what is in fact a common carrier service into a private carrier offering simply by filing an ICB rate.^{4/} And, in this context, the Bureau's also-

^{4/} Part of the problem here may be Bell Atlantic's apparent confusion between "Commission policy regarding individual case basis ('ICB') service offerings" (Petition, p. 1)
(continued...)

objected-to statement that, "[o]nce sufficient knowledge is gained about the costs of the service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers,"^{4/} can be recognized as accurate. In other words, the Commission may allow ICB rates to be filed for certain elements of a common carrier service for which insufficient experience exists to derive averaged rates, but may later find, as it has from the outset in regard to the LECs' rates for labor and material charges for initial preparation of central office space under physical collocation, that ICB rates are not necessary or (in view of the competitive implications) appropriate, and must give way to publication of averaged rate schedules.^{5/}

^{4/} (...continued)

(Emphasis added) -- which may be provided on a private carriage basis -- and ICB rate elements that are part of a common carrier service such as the time and material charges for preparation of central office space which are at issue in this proceeding.

^{5/} Order, ¶ 17.

^{6/} Contrary to Bell Atlantic's suggestion, the Bureau's language does not indicate that what is otherwise a non-dominant private carrier offering becomes a common carrier service solely by being included in a tariff. The Commission may require dominant carriers to function as common carriers for public interest reasons, but could not (or, at least, would be hard pressed to) impose such a requirement on non-dominant carriers.

II. The Order Is Consistent With The Court's Dark Fiber Decision And With The Commission's Authority To Determine Whether A Service Fits The Definition Of Common Carriage Under Existing Commission Policy

The Ad Hoc Committee also agrees with the comments pointing out that Bell Atlantic misconstrues the D. C. Circuit's Dark Fiber Decision, and demonstrating that there is nothing contrary to that decision to be found in the Order.^{2/} Nothing in the Dark Fiber Decision precludes the Commission from applying the long-standing two-part test of common carriage^{8/} in determining whether any given service, notwithstanding that it heretofore may have been provided on an ICB basis, is a common carrier offering. The problem the Court identified in the Dark Fiber Decision was that the Commission based its finding of common carriage upon the mere filing of the dark fiber ICB arrangement with the Commission, rather than upon application of the established test of common carriage.^{2/} The Court itself cited with approval

^{2/} ALTS Comments, pp. 2-3; Sprint Comments, pp. 2-5; MCI Comments, pp. 3-5; MFS Comments, pp. 9-10.

^{8/} A common carrier offering is defined as one that is held out to the public on a generally available, first-come, first-served basis. National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976); See also, National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

^{2/} Furthermore, the Court did not find the dark fiber services at issue were not common carrier services, but only that the Commission had failed to justify its exercise of Title II jurisdiction over these services, remanding the issue to the Commission for further consideration. Dark Fiber Decision, 19 F.3d at 1480-81. Obviously, the Court said nothing of the expanded interconnection services which are the subject of Bell Atlantic's clarification request.

language from the Commission's LEC Price Cap Order^{10/} wherein the Commission expressly found that "[a]s demand for the service grows, the ICB offering can evolve into a generally-available offering". The Bureau's Order is fully consistent with that policy. Contrary to Bell Atlantic's arguments (Petition, pp. 2-3), the Court's Dark Fiber Decision is not inconsistent with the Order's language, nor is rulemaking required to change existing Commission policy in respect to ICB rates and service offerings. Petition, p. 3.

III. The Bureau Should Reaffirm The Need For Filing Averaged Rates To Protect Interconnectors And Competitors From Anticompetitive Pricing And Discrimination

The Ad Hoc Committee does not object per se to clarification of language contained in the Order to the extent the Bureau deems it necessary. However, apart from, and regardless of, its resolution of Bell Atlantic's request for clarification, the Common Carrier Bureau should affirm its intention to enforce the Commission's determination in the Expanded Interconnection Order^{11/} that ICB pricing for certain connection charge elements, including the labor and material charges for initial preparation of central office space under physical collocation, will not be allowed. The LECs should not be permitted to seek indirect reconsideration of this requirement, in effect using Bell Atlantic's request for clarification to "reargue" the issue

^{10/} Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 at ¶ 193 (1990).

^{11/} Expanded Interconnection with Local Telephone Facilities, 7 FCC Rcd 7369 (1992).

of whether physical collocation constitutes a communications service. As noted by MCI,^{12/} Bell Atlantic has repeatedly attempted to establish ICB pricing for central office construction, ignoring the Expanded Interconnection Order's express rejection of the use of individually negotiated tariff arrangements for such construction^{13/} and, in defiance thereof, filing tariffs proposing to charge ICB rates. To the extent Bell Atlantic's request for clarification seeks to perpetuate its efforts in this direction, it should be forcefully and unequivocally rejected.

On a broader scale, any "clarification" issued by the Bureau should recognize and affirm the Commission's power to require the filing of cost-based averaged rates for common carrier services as a safeguard against anti-competitive and predatory LEC pricing practices. To the extent Bell Atlantic seeks a blanket interpretation by the Commission that ICB arrangements are not common carrier services and not subject to Title II regulation, its request should be rejected.^{14/} As noted in the comments filed by MFS Communications Company, Inc., such an interpretation

^{12/} MCI Comments, pp. 2-3.

^{13/} Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order, 7 FCC Rcd 7369, 7403 (1992) ("Expanded Interconnection Order").

^{14/} At least one LEC, US WEST, appears to acknowledge as much, noting: "It is, of course, possible to read the language in the Supplemental Designation Order as doing nothing more than stating the obvious - that a carrier cannot use the ICB route to evade the requirements of Title II of the Communications Act. We have no quarrel with that proposition." US WEST Comments, p. 2.

would allow LECs to remove any service from the tariff review process simply by repricing it as an ICB.^{15/}

The filing of tariffed averaged rates, supported by appropriately documented cost information, must remain a principal guardian of effective competition in venues such as the exchange access market where the entrenched participant continues to wield overwhelming market power and maintains control of bottleneck facilities. For that reason, the Bureau should strongly reject the protests voiced in Southwestern Bell's comments concerning the so-called "dissonant application of policy regarding ICB pricing . . . [whereby] "the Commission has allowed SWBT's competitors to incorporate language in their tariffs which would allow continued use of ICB pricing, while rejecting SWBT's identical ICB tariff language."^{16/} There are valid public interest reasons underlying the Commission's policies relative to less stringent regulation of nondominant carriers that are in no way called into question by the Court's holding in the Dark Fiber Decision. As pointed out in the comments submitted by MFS Communications Company, Inc., the Commission has appropriately considered whether service providers possess market power, and whether there are any countervailing

^{15/} MFS Comments, p. 2.

^{16/} Southwestern Bell Comments, p. 3. Footnotes omitted.

factors militating against the exercise of such market power, in applying Title II jurisdiction.^{17/}

IV. Conclusion

The Bell Atlantic Petition should be denied. To the extent clarification is issued, it should be consistent with these comments.

Respectfully submitted,

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^{17/} MFS Comments, p. 11, citing Norlight Request for Declaratory Ruling, 2 FCC Rcd 132, 134 recon. denied, 2 FCC Rcd 5167 (1987) and Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 7 FCC Rcd 3528, 3532 (1992).

CERTIFICATE OF SERVICE

I, Elizabeth A. Fertig, a secretary in the law offices of Gardner, Carton & Douglas, do hereby certify on September 13, 1994, a true copy of the foregoing "Reply Comments of the Ad Hoc Telecommunications Users Committee" was sent by United States first class mail, postage prepaid, to the following:

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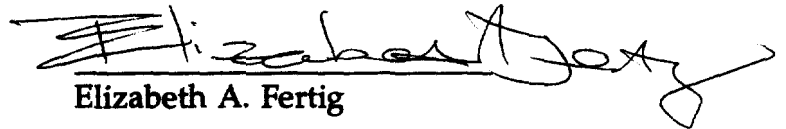
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